REMARKS

The present amendment is being filed together with a Request for Continued Examination under 37 C.F.R. 1.114.

The Examiner has rejected claims 1-8, 10-17 and 19-23 under 35 U.S.C. 103(a) over U.S. patent 6,605,344 to Ohba et al. in view of U.S. patent 5,069,946 to Moritani et al. It is respectfully submitted that the rejection has been overcome by the instant amendment. The claims have been amended to specify that the claimed packaged produce product comprises a gas permeable package. The claims have been further amended to include the more limiting "consisting essentially of" transitional phrase instead of the broader "comprising". It is believed that this limitation overcomes any potential conflict with the applied art.

The present invention now claims a packaged produce product comprising a gas permeable package formed from at least one coextruded polyamide film, said film consisting essentially of at least one first layer formed from a polyamide selected from the group consisting of nylon 6, nylon 66 and blends thereof, and at least one second layer of nylon 6,66 in contact with said first layer, said nylon 6,66 having a nylon 6 moiety and a nylon 66 moiety, and produce contained within said package, said gas permeable package being formed from at least one polyamide film being heat sealed via said nylon 6,66 layer. The films of the invention have been specifically designed in order to permit the escape of gases that are generated by packaged produce, such as ethylene, carbon dioxide and oxygen. This aids in produce maturity, appearance and extended shelf life. The films of the invention also exhibit excellent water vapor permeability, thereby preventing interior water condensation which deteriorates and spoils packaged produce.

The Examiner has applied U.S. patent 6,605,344 to Ohba, et al., which teaches different multilayer film structures having *markedly opposite gas barrier properties*. Particularly,

Ohba, et al. describe gas barrier multilayer films each of which require the presence of (i) a polymer layer formed of a mixture of polyalcohol and at least one poly(meth)acrylic acid polymer; and (ii) a metallic-compound-containing layer on a surface of the polymer layer. As evidenced by each of the examples of Ohba, et al., the presence of said polymer layer (i) and metallic-compound-containing layer (ii) produces multilayer films having distinctly low oxygen permeability. Particularly, examples 1-58 of Ohba, et al. describe films having oxygen permeabilities ranging from <0.1 to 4.3 cc/m^2day at 30°C, 80% Relative Humidity. In comparison, Applicant teaches a nylon 6/nylon 6,66 coextruded film (see Table 1) having significantly higher oxygen permeabilities of 63.23 cc/m^2day at 23°C, 65% RH and 96.70 cc/m^2day at 23°C, 90% RH. As emphasized by the description of Ohba, et al. and as illustrated by their Comparative Examples, multilayer films having high oxygen permeabilities are undesirable and not suitable for achieving their intended purposes.

As previously submitted, Ohba, et al. does show adjacent nylon layers, i.e. a substrate which may be nylon 6 and a plastic film layer which may be nylon 6,66. However, Ohba, et al. fails to teach or suggest multilayer coextruded films consisting only of highly permeable nylon layers, or more particularly, fails to teach or suggest gas permeable multilayer films including both a nylon a polyamide selected from the group consisting of nylon 6, nylon 66 and blends thereof, and at least one second nylon layer of nylon 6,66 in contact with said first nylon layer, without additionally including the presence of (i) a polymer layer formed of a mixture of polyalcohol and at least one poly(meth)acrylic acid polymer; and (ii) a metallic-compound-containing layer on a surface of the polymer layer. The absence of layers (i) and (ii) in the films of Ohba, et al. would render their films unsatisfactory for their intended purpose. If a proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

Furthermore, as the Examiner recognizes, Ohba, et al. does not teach or suggest that their complete films may be produced by coextrusion. Their films may only be formed by lamination, coating, dry lamination or extrusion coating techniques. The Examiner has attempted to fill this void by pointing to Moritani, et al. for the proposition that coextrusion and lamination are interchangeable. For support, the Examiner directs the Applicant to the following language at col. 9, lines 58-63,

> [t]he multilayered packaging materials of the first and the second embodiments can be produced by the following various laminating processes: co-extrusion with or without an interlayer adhesive resin, dry lamination, sandwich lamination, extrusion lamination, co-extrusion lamination and the like.

However, as previously submitted, the Examiner's conclusion is incorrect. Coextrusion and lamination are distinctly different and unrelated techniques used to combine film layers. While Moritani, et al. lists both lamination and co-extrusion as useful techniques for forming *their own* multilayered films, this is insufficient to establish these techniques as interchangeable *per se*. The Examiner's conclusion is overly broad. For example, a metallic-compound-containing layer such as described by Ohba, et al. *cannot be attached by coextrusion* with other film layers, but *can be attached by lamination* with other film layers. For the specific films of Moritani, both coextrusion and lamination techniques may be used. However, in the art of multilayered films *as a whole*, it is well understood by one skilled in the art that the two techniques are distinctly different and not interchangeable.

The Examiner further points to col. 9, lines 58-63 to point out that Moritani et al. defines coextrusion as a type of lamination. It is respectfully submitted that any description in Moritani describing coextrusion as a type of lamination, or vice versa, is inconsistent with the ordinary and customary meanings of those terms. It is an established principle of patent law that terms are presumed to have their ordinary and customary meanings attributed to them by those of ordinary skill in the art. *Sunrace Roots Enter. Co. v. SRAM Corp.*, 336 F.3d 1298, 1302, 67 USPQ2d 1438, 1441 (Fed. Cir. 2003); *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298 67 USPQ2d 1132, 1136 (Fed. Cir.

2003). Correspondingly, the ordinary and customary meaning of the term "coextrusion" does not encompass lamination. Likewise, the ordinary and customary meaning of the term "lamination" does not encompass coextrusion. Even if Moritani, et al. chooses to classify coextrusion as a type of lamination in their own context, this is not the case with the instant invention nor is such the ordinary interpretation of these terms in the relevant art. The Examiner also argues that Moritani does not limit their definition of coextrusion as a type of lamination only for their own context. It is respectfully submitted that such is irrelevant. Even if Moritani fallaciously believed that coextrusion was a type of lamination, such is inconsistent with the ordinary and customary meanings of the terms.

It is respectfully submitted that one of ordinary skill in the art would understand that coextrusion and lamination are two distinctly different and unrelated technique used to combine film layers. Accordingly, it is respectfully submitted that while the Moritani reference may uniquely define coextrusion as a type of lamination process, it is through the ordinary and customary meaning of the term coextrusion that the claims must be interpreted.

It is urged that a combination of the teachings of Ohba, et al. with Moritani et al. would not make the claimed invention obvious to one skilled in the art. Both Applicant and the Examiner agree that Ohba, et al do not show coextrusion. Further, Moritani et al. fails to teach or suggest the coextrusion of a first layer of nylon 6, nylon 66 a blend thereof, and a second layer of nylon 6,66, in contact with said first layer, and thereby forming a gas permeable package by heat sealing the polyamide film via said nylon 6,66 layer. The Moritani et al. reference does describe the coextrusion of an EVOH-polyamide blend layer with a second layer that may be a nylon layer to produce their gas barrier films. However, this is very different than the claimed produce package wherein a layer of nylon 6, nylon 66 or blend of nylon 6 and nylon 66 is co-extruded with a layer of a nylon 6,66 copolymer. It is therefore submitted that the combination of Ohba et al and Moritani et al. does not suggest coextruding and contacting a first layer of nylon 6, nylon 66 or blends thereof, and a second layer of nylon 6,66.

With regard to the sustained rejections over the individual dependent claims, it is respectfully submitted that the rejections are moot in view of the instant amendment.

In determining the differences between the prior art and the claims, the question under 35 U.S.C. 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 218 USPQ 871 (Fed. Cir. 1983); Schneck v. Nortron Corp., 713 F.2d 782, 218 USPQ 698 (Fed. Cir. 1983). It is respectfully asserted that the invention as a whole would not have been obvious to one of ordinary skill in the art at the time the invention was made.

For these reasons it is submitted that the rejection of claims 1-8, 10-17, 19-20 and 22-24 under 35 U.S.C. 103 over Ohba, et al in view of Moritani, et al. have been overcome by the instant amendments.

The Examiner has rejected claims 9 and 18 under 35 U.S.C. 103 over Ohba, et al in view of Moritani, et al. and further in view of Reading (U.S. patent 3,038,811). It is respectfully asserted that this ground of rejection has been overcome by the instant amendment. The combined references fail to teach or suggest a gas permeable film having perforations.

The arguments over Ohba, et al in view of Moritani, et al. are repeated from above. Reading is cited to show then making of perforations in a food package. However, Reading relates to a materially different film material. Reading only shows a perforated wrapper for food which is formed from non-resilient materials, i.e. *paper*, such as vegetable parchment, laminated to a *metal foil* such a aluminum. Reading does not show or suggest a perforated *nylon* film, much less a film composed of first and second nylon layers which are *coextruded*. It is submitted that the combination of Ohba, et al in view

of Moritani, et al. and further in view of Reading is merely a reconstruction of the art in light of the Applicant's disclosure.

In addition, is it respectfully submitted that the Examiner's proposed modification of Ohba, et al. is in direct contradiction with the teachings of Ohba, et al. Particularly, Ohba, et al. teaches gas barrier films having extremely low oxygen gas permeability as well as water impermeability, which barrier properties would be destroyed by perforating their film layers. In contrast, Applicant teaches mechanical or laser perforation of the claimed films in order to beneficially permit gases that are generated by packaged produce to escape, such that no or minimal condensation appears on the surface of the packaging material. The perforations permit the tailoring of the modified atmosphere in the package to the particular fruit or vegetable in the package, as well as its ripeness, etc.

The Examiner argues that one of ordinary skill in the art would have recognized the advantage of providing for the perforations of Reading in Ohba, et al. and Moritani, et al. Applicant respectfully disagrees. Indeed, it is submitted that this underscores the apparent differences between the teachings of Ohba, et al. and the teachings of the presently claimed invention, i.e. gas barrier films vs. gas permeable films. Rather than suggesting perforated multilayer films as the Examiner proposes, Ohba, et al. directly teaches away from perforated films. It is respectfully submitted that there is simply no motivation in the art to lead one skilled in the art to combine the teachings of Ohba, et al. and Moritani et al. with Reading to form a perforated film where a perforated film would render the films of Ohba, et al. unsatisfactory for their intended purposes.

In the Advisory Action, the Examiner states that Ohba, et al. do not teach that barrier properties would be destroyed by perforation. This is literally correct because Ohba, et al. do not teach, suggest or mention perforation at all. However, what Ohba, et al. does specifically teach is the formation of films having excellent oxygen-gas-barrier properties in an atmosphere of high humidity (see col. 10, lines 62-65). These films are used for packaging of beverages or other foods susceptible to oxygen. The only purpose described

in both the Application and in Reading for the formation of perforations is to enable the transmission of gases through the perforations (see Reading, col. 2, lines 18-29; see Application, p. 1, lines 22-27; p. 6, lines 10-14). This is in direct contrast with the teachings of Ohba, et al. which teaches gas barrier films and would alter its principle of operation.

Accordingly, the Examiner has failed to establish a *prima facie* of obviousness under 35 U.S.C. 103(a) for the production of a perforated film. If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious. *In re Ratti*, 270 F.2d 810, 123 USPQ 349 (CCPA 1959). In establishing a *prima facia* case of obviousness under 35 U.S.C. 103, it is incumbent upon the Examiner to provide a reason why one having ordinary skill in the art would have been led to combine references to arrive at the claimed invention. The requisite motivation must stem from some teaching, suggestion or interest in the prior art as a whole or from knowledge generally available to one having ordinary skill in the art. See Uniroyal, Inc. v. Rudkin Riley, Corp., 837 F. 2d 1044, 5 USPQ 2d 1434 (Fed. Cir. 1988); Ashland Oil, Inc. v. Delta Resin And Refractories, Inc., 776 F. 2d 281, 227 USPQ 657 (Fed. Cir. 1985). In determining a *prima facie* case of obviousness, it is necessary to ascertain whether or not the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the reference before him to make the proposed substitution, combination, or other modification. *In re Linter*, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972). To do so, the applied prior art must be such that it would have provided one of ordinary skill in the art with both a motivation to carry out the claimed invention and a reasonable expectation of success in doing so. *See In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991); *In re O'Farrell*, 853 F.2d 894, 902, 7 USPQ2d 1673, 1680 (Fed. Cir. 1988). Such a teaching or suggestion and the requisite reasonable expectation of success is absent in the applied art.

For these reasons it is submitted that the rejection of claims 9 and 18 under 35 U.S.C. 103 over Ohba, et al in view of Moritani, et al. and further in view of Reading has been overcome.

It is again submitted that the Examiner is reconstructing the art in light of Applicant's disclosure. The point in time that is critical for an obviousness determination is at the time the invention. "To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher." *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983). Obviousness cannot be established by hindsight combination to produce the claimed invention. *In re Gorman*, 933 F.2d 982, 986, 18 USPQ2d 1885, 1888 (Fed.Cir.1991). It is the prior art itself, and not the applicant's achievement, that must establish the obviousness of the combination.

Further, where claimed subject matter has been rejected as obvious in view of prior art references, a proper analysis under 35 U.S.C. 103 requires consideration of two factors: (1) whether the prior art would have suggested to those of ordinary skill in the art that they should make the claimed composite or device or carry out the claimed process; and (2) whether the prior art would also have revealed that in so making or carrying out the claimed invention those of ordinary skill would have a reasonable expectation of success. See *In Re Dow Chemical Company* 837 Fed. 2d 469, 473, 5 USPQ 2d 1529, 1531 (Fed. Cir. 1988). Both the suggestions and the reasonable expectation of success must be found in the prior art, not in Applicant's disclosure.

Applicants respectfully assert that such a suggestion and/or reasonable expectation of success could not be found in the cited references. Neither Ohba, et al., nor Moritani, et al., nor Reading, taken singularly or in combination, teach or suggest the claimed subject

matter. The Patent and Trademark Office Board of Appeals and Interferences stated the following in *Ex parte Clapp*, 227 USPQ 972 (1985), at page 973:

> Presuming arguendo that the references show the elements or concepts urged by the Examiner, the Examiner has presented no line of reasoning, and we know of none, as to why the artist when viewing only the collective teachings of the references would have found it obvious to selectively pick and choose various elements and/or concepts from the several references relied on to arrive at the claimed invention. In the instant application, the Examiner has done little more than cite references to show that one or more elements or some combinations thereof, when each is viewed in a vacuum, is known. The claimed invention, however, is clearly directed to the combination of elements. That is to say, applicant does not claim that he has invented one or more new elements but has presented claims to a new combination of elements. To support the conclusion of the claimed combination is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed combination where the Examiner must present a convincing line of reasoning as to why the artist would have found the claimed invention to have been obvious in light of the teaching of the references.

With the above directives, consideration must be given as to whether the combination of references in the manner set forth in the Office Action is proper to render the applicant's invention obvious in view thereof. As set forth hereinabove, Applicant's respectfully assert that the references do not teach or suggest the combination as set forth in the claims, as is evident from the plurality of differences between Applicant's invention and the cited art. For these reasons, it is submitted that the rejection is overcome and should be withdrawn.

The undersigned respectfully requests re-examination of this application and believes it is now in condition for allowance. Such action is requested. If the Examiner believes there

is any matter which prevents allowance of the present application, it is requested that the undersigned be contacted to arrange for an interview which may expedite prosecution.

Respectfully submitted,

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I hereby certify that this paper is being facsimile transmitted to the United States Patent and Trademark Office (FAX No. 571-273-8300) on July 19, 2006

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